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Life Insurance as an Asset in Bankruptcy

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Not every policy of insurance upon a bankrupt's life passes to his trustee as assets for the benefit of creditors. "While life insurance is property, it is peculiar property."[2] Like other property, it is an asset only to the extent of his ownership and equity. What constitutes ownership of such an asset? More accurately, what ownership must appear to make the policy an asset? And when and why do such assets pass to the trustee?

These questions arise before the policy matures. For, if the death contemplated by the policy had happened or the stipulated efflux of time had occurred before the bankruptcy, the insurer's obligation would have been consummate and the only inquiry would be the usual one as to whom belong the proceeds of the policy by its terms. And if it had occurred after the petition had been filed, the trustee would gain nothing thereby for the property which vests in him at the time of adjudication is that which the bankrupt owned at the time the petition was filed.[3] The situation we are considering involves no obligation upon the insurer to pay anybody presently. What property in a policy, then, before its maturity, has the insured bankrupt which may enure as an asset in bankruptcy?

If an ordinary (as distinguished from fraternal or mutual benefit) life insurance policy is payable absolutely to a beneficiary other than the insured, say to his wife, and if no power is reserved to him by the policy to change the beneficiary, such beneficiary has a vested interest,[4] although he pays the premiums.[5] Neither he nor the insurance

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[2]Day, J., in Burlingham v. Crouse, 228 U. S. 459, 472 (1913).

[3]Everett v. Judson, 228 U. S. 474, 479 (1913).

[4]Mutual Life Ins. Co. v. Allen, 212 Ill. 134 (1904); Lloyd v. Royal Union *Etc.* Co., 245 Fed. 162 (1917), and authorities there collated. But see criticism in Note, 13 Harv. L. Rev. 682. This textual statement does not apply to policies issued by fraternal or mutual benefit associations. See cases cited in Lloyd case, *supra*, especially Carpenter v. Knapp, 101 Iowa 712 (1897).

[5]Harley v. Heist, 86 Ind. 196 (1882). "(It is said * * * that to deny to the husband, who has paid the premium, the right to dispose of the policy to his own use, after the death of the wife, imposes upon him a hardship and wrong. A sufficient answer to this is that, if he wishes to retain to himself the control and ownership of the policy in such case, he may so provide in the policy".)

company, nor both together, may terminate the contract without her consent except in the manner provided by the policy or the law.[6] Upon his death or the expiration of the time limited in the policy, the proceeds are hers regardless of his debts. No acts by or against him can deprive her of the policy or its proceeds, because it is her property and not his.[7] Hence his bankruptcy does not affect it. If he defaults in payment of the premiums, the policy, of course, may lapse, but even then its surrender value, if any, is hers, and she may preserve her rights by paying the premiums herself and thus eventually obtain the full insurance.[8]

Our question, therefore, arises only in two situations: I. When the bankrupt has made or is himself (or his estate or personal representative) the beneficiary; and II. When the policy has reserved him the right to change the beneficiary at will and thereby divest the interest of the beneficiary.

I. Not every policy, however, of which the insured bankrupt is the beneficiary, passes to his trustee. Whether and what the trustee takes depends on the Bankruptcy Act of 1898.[9]

That Act, section 70a, invests the trustee with title to all property of the bankrupt which is not exempt, and

> "(3) all powers which he might have exercised for his own benefit * * * (5) property which prior to the filing of his petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate or personal representative, he may within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry suoh policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets * * * "

A cursory reading provokes instant query whether the trustee takes by virtue of the proviso or by force of the general words preceding it.

[6]Washington Life Ins. Co. v. Berwald, 97 Tex. 111 (1903). To the same effect despite a reservation in the policy of a right in the insured to change the beneficiary, see Roberts v. Northwestern Nat. Etc. Co., 143 Ga. 780 (1915). The better view, however, is *contra* to the Roberts case. See footnote 29, *infra*.

[7]Jackson Bank v. Williams, 77 Miss. 398 (1899).

[8]Whitehead v. New York Life Ins. Co., 102 N. Y. 143 (1886).

[9]30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. Supp. 1911, p. 1511.

In those courts which adopted the latter conclusion, the function of the proviso was confined to delineating those instances which afforded the bankrupt the right to redeem—by paying the cash surrender value—certain policies which were deemed otherwise to pass to the trustee under the operative general words.[10] In those courts which reached the former conclusion, the trustee was held to acquire title to those policies only which conformed to the description of the proviso, *i. e.* those having a cash surrender value payable to the bankrupt or his estate.[11]

It is submitted that these interpretations are neither necessary alternatives, nor *per sese* correct; that on the other hand, the true construction is that the trustee takes by virtue of the general words of the statute as modified by the specific language of the proviso; that the real problem involved is not whether the trustee takes by virtue of one clause or the other but what he takes by force of both; that what he takes as assets is whatever the bankrupt could get out of his policy by his own unassisted act at the time of his bankruptcy and nothing more.

It was not until 1913 that the Federal Supreme Court exploded the aforesaid latter interpretation which had vested title in the trustee to all policies of the bankrupt irrespective of their possession of a cash surrender value. In *Burlingham v. Crouse*,[12] that court adverted to the contrariety of decision in the lower courts, but, while feeling called upon "to determine the congressional intent in this respect," actually upheld neither contention *per se*. As a decision, it was dispositive only to the extent above stated. Let it speak for itself.

The question involved was the status of a trustee in bankruptcy to set aside an alleged preferential transfer of insurance policies upon the life of the bankrupt who died shortly after adjudication. The transfer had been made before the petition in bankruptcy was filed. At that time the bankrupt was not entitled to any cash surrender value on the policies, having previously borrowed from the insurer the full amount thereof. The Circuit Court of Appeals[13] held that these policies did not pass as assets, and hence the trustee had no standing to maintain his suit. The Supreme Court affirmed this decision.

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[10] *Re* Becker, 106 Fed. 54 (1901); *Re* Slingluff, 106 Fed. 154 (1900); *Re* Welling, 113 Fed. 189 (1902); *Re* Coleman, 136 Fed. 818 (1905); *Re* Hettling, 175 Fed. 65 (1909); *Re* Orear, 178 Fed. 632 (1910).

[11] *Re* Buelow, 98 Fed. 86 (1899); *Re* Josephson, 121 Fed. 142 (1903); Gould v. New York Life Ins. Co., 132 Fed. 927 (1904); Morris v. Dodd, 110 Ga. 606 (1900). For further presentation of the conflicting views, see notes to *Re* White 26 L. R. A. (N. S.) 451, and *Re* Andrews, 41 L. R. A. (N. S.) 123.

[12] 228 U. S. 459, 564 (1913).

[13] 181 Fed. 479 (1910).

It first determined the nature of cash surrender value,[14] then examined previous adjudications,[15] and proceeded:

> "True it is that life insurance policies are a species of property and might be held to pass under the general terms of subdiv. 5, § 70a, but a proviso dealing with a class of this property was inserted and must be given its due weight in construing the statute. It is also true that a proviso may sometimes mean simply additional legislation, and not be intended to have the usual and primary office of a proviso, which is to limit generalities and exclude from the scope of the statute that which would otherwise be within its terms.
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> "This proviso deals with explicitness with the subject of life insurance held by the bankrupt which has a surrender value. Originally life insurance policies were contracts in consideration of annual sums paid as premiums for the payment of a fixed sum on the death of the insured. It is true that such contracts have been much varied in form since, and policies payable in a period of years, so as to become investments and means of money saving, are in common use. But most of these policies will be found to have either a stipulated surrender value or an established value, the amount of which the companies are willing to pay, and which brings the policy within the terms of the proviso (*Hiscock v. Mertens, supra*), [16] and makes its present value available to the bankrupt estate. * * *

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[14]The court by Mr. Justice Day said: "Life insurance may be given in a contract providing simply for payment of premiums on a calculated basis which accumulates no surplus for the holder. Such insurance has no surrender value. Policies, whether payable at the end of a term of years or at death, may be issued upon a basis of calculation which accumulates a net reserve in favor of the policy holder, and which forms a consequent basis for the surrender of the policy by the insured, with advantage to the company upon the payment of a part of this accumulated reserve."

[15]It quoted from *Re* McKinney, 15 Fed. 535, 537 (1883), as follows: "The first of these elements, the surrender value of the policy, arises from the fact that the fixed annual premium is much in excess of the annual risk during the earlier years of the policy,—an excess made necessary in order to balance the deficiency of the same premium to meet the annual risk during the latter years of the policy. This excess in the premium paid over the annual cost of insurance, with accumulations, of interest, constitutes the surrender value. Though this excess of premiums paid is legally the sole property of the company, still in practical effect, though not in law, it is moneys of the assured, deposited with the company in advance, to make up the deficiency in later premiums to cover the annual cost of insurance, instead of being retained by the assured, and paid by him to the company in the shape of greatly-increased premiums, when the risk is greatest. It is the 'net reserve' required by law to be kept by the company for the benefit of the assured and to be maintained to the credit of the policy. So long as the policy remains in force, the company has not practically any beneficial interest in it, except as its custodian, with the obligation to maintain it unimpaired and suitably invested for the benefit of the insured. This is the practical, though not the legal, relation of the company to this fund.

"Upon the surrender of the policy before the death of the assured, the company, to be relieved from all responsibility for the increased risk, which is represented by this accumulating reserve, could well afford to surrender a considerable part of it to the assured, or his representative. A return of a part in some form or other is now usually made."

"Congress undoubtedly had the nature of insurance contracts in mind in passing § 70a with its proviso. Ordinarily the keeping up of insurance of either class would require the payment of premiums perhaps for a number of years. For this purpose the estate might or might not have funds, or the payments might be so deferred as to unduly embarrass the settlement of the estate. Congress recognized also that many policies at the time of bankruptcy might have a very considerable present value which a bankrupt could realize by surrendering his policy to the company. We think it was this latter sum that the act intended to secure to creditors by requiring its payment to the trustee as a condition of keeping the policy alive. In passing this statute Congress intended, while exacting this much, that when that sum was realized to the estate, the bankrupt should be permitted to retain the insurance which, because of advancing years or declining health, it might be impossible for him to replace. It is the two-fold purpose of the bankruptcy act to convert the estate of the bankrupt into cash and distribute it among creditors, and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched. In the light of this policy the act must be construed. We think it was the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset; otherwise to leave to the insured the benefit of his life insurance. * * * As we have construed the statute, its purpose was to vest the surrender value in the trustee for the benefit of the creditors, and not otherwise to limit the bankrupt in dealing with his policy."

As a decision, it disposes of the notion—the aforesaid latter interpretation—that what passed to the trustee by the general words was unaffected by the proviso save by way of redemption in certain instances. It holds that the proviso must be given due weight—nay more, great moment—in construing the statute as a whole. It is decisive of what the trustee takes. It is silent on the question by which clause he takes. Is it not eloquent, the *ratio decidendi* considered, that he takes by both?

Unless the policy may be cashed, it is quite worthless, at least highly speculative. Why penalize the bankrupt by forfeiture of his policy without affording commensurate benefit to the creditors? The decision is sound.

This decision was supplemented at the same term by *Everett v. Judson*,[17] which held that the time when the petition in bankruptcy is filed determines when the cash surrender value is to be ascertained, and hence, the bankrupt's death intervening, adjudication does not convert the surplus proceeds above such cash surrender value into

[16] *Infra*, note 20.
[17] 228 U. S. 474 (1913).

assets, and was further supplemented by *Andrews v. Partridge*[18] which adjudged to such bankrupt's executor the policy proceeds deducting such cash surrender value.

It remains to consider the former alternative interpretation aforesaid. Because cash surrender value is thus determined to be an essential ingredient of life insurance policies as assets upon bankruptcy, emphasis although not origin, has been given to the idea that the sole source of the trustee's title to such policies is found in the proviso; that he takes only those which conform to the description therein. We may conveniently postpone this inquiry until we consider the second major point of this paper. In the meantime it may be profitable to determine what constitutes the existence of cash surrender value within the rule.

Payment by the insurer of such cash surrender value need not be expressly stipulated in the policy.[19] It suffices if the insurance company recognizes that the policy possesses a cash surrender value and is universally, as distinguished from a chance concession, willing to pay that value upon surrender of the policy according to fixed and uniform rates.[20] But in the absence of express stipulation in the

[18]228 U. S. 479 (1913).

[19]Holden v. Stratton, 198 U. S. 202 (1905), (*semble*). In this case it was held that the trustee had no right to any policy if the same was exempt under state laws. The court said: "As § 70a deals only with property which, not being exempt, passes to the trustee, the mission of the proviso was, in the interest of the perpetuation of policies of life insurance, to provide a rule by which, where such policies passed to the trustee because they were not exempt, if they had a surrender value, their future operation could be preserved by vesting the bankrupt with the privilege of paying such surrender value whereby the policy would be withdrawn out of the category of an asset of the estate. That is to say, the purpose of the proviso was to confer a benefit upon the insured bankrupt by limiting the character of the interest in a nonexempt life insurance policy which should pass to the trustee, and not to cause such a policy when exempt to become an asset of the estate. When the purpose of the proviso is thus ascertained it becomes apparent that to maintain the construction which the argument seeks to affix to the proviso would cause it to produce a result diametrically opposed to its spirit and to the purpose it was intended to subserve."

[20]Hiscock v. Mertens, 205 U. S. 202 (1907); Matter of Gannon, 58 N. Y. L. J. (C. C. A.) 923 (1917). In the Mertens case, the court, by Mr. Justice McKenna, said: "What possible difference could it make whether the surrender value was stipulated in a policy or universally recognized by the companies? In either case the purpose of the statute would be subserved, which was to secure to the trustee the sum of such value and to enable the bankrupt to 'continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of the estate under the bankruptcy proceedings.'"

In the Gannon case, the court, by Rogers, Cir. J., said: "The phrase 'surrender value' we think, must now be held to cover any and every policy which the insured by his own efforts, unassisted by any beneficiary or assignee, can obtain from the insurer in cash and in cancellation of the policy at the date of the petition filed, the amount being determined in accordance with a fixed and definite method of compensation, uniform in all cases. The amount which can be thus obtained is the cash surrender value of the policy. It makes no difference whether the amount he can obtain is secured to him by a statute, or rests upon the mere willingness of the company to buy out the policy at the particular time. The material and important fact is at the time of the adjudication the policy had a value which the company was willing to pay and which the bankrupt by his own act could obtain."

policy, a failure by the trustee to duly prove the existence in fact of such universal willingness of the particular insuring company to buy out its policies is fatal to his claim in respect of the particular policy.[21] The creditors lose, not because such policy was not an asset, but because the trustee failed to establish that it had a cash surrender value.

Even if a policy has a surrender value as above defined, it will not pass to the trustee unless it is payable exclusively to the bankrupt, his estate or personal representative. If consent or a receipt or release is required to be given or executed by someone other than the insured, or in conjunction with him, the trustee has no interest therein.[22]

The decisions last cited are sound. Their true ground is that the beneficiary has a vested interest not only in the policy but in the cash surrender value of which they cannot be deprived by any act by or against the bankrupt. The transition, however, is but slight to the dangerous premise that the trustee cannot take simply because the cash surrender value is not worded as payable to the bankrupt or his estate or, in other words, that to be assets in his hands, the policy must conform to the proviso which is the sole source of his title thereto. And this revives the old contention, the aforesaid former interpretation, which we had left in abeyance.

II. Assume that the policy has reserved the insured bankrupt the right to change the beneficiary at will. Although he may have named some beneficiary other than himself, and hence the cash surrender value is not, in terms, "payable to himself, his estate or personal representative", his power of control, his ownership of the policy is such that he might any time after issuance and at the very moment of bankruptcy have caused it to be so made payable.

Here let us attend with care. The policy is a contract to be construed according to its terms. The phraseology of contractual terms is without end. There is no magic in a contract of life insurance which reserves the insured a right to change the beneficiary. It is a plain question of construction. The result we have just reached was attained because the said reserved right was to change *at will*. If it is so expressly stipulated in the policy, or if the court determines the language of the reservation tantamount thereto, the result is as mentioned in the preceding paragraph.[23] Otherwise, if the right

[21]Matter of Gannon, *supra*, note 20.

[22]Matter of Lyon, 32 Am. B. R. 483 (1914); *In re* Eddy, 36 Am. B. R. 294 (1915).

[23]Thus, in Townsend v. Fidelity & Casualty Co., 163 Iowa 713 (1913), the policy provided: "The consent of the beneficiary shall not be required to the * * * change of beneficiary or to any other change in the policy." *Held*, there being no restrictions upon the right of insured to change the beneficiaries in such manner as

depends upon the consent of the beneficiary or some release or receipt to be given by the latter.[24] Such a "right" is more in the nature of an expression of volition by the insurer conditioned on the willingness of the original beneficiary. Such a right does not make the insured the owner of the policy—it lacks the essential qualities of dominion, the power to control. Again, if the right, although independent of the beneficiary, and consequently *at will* within the definition, is circumscribed by restrictions or hedged by precedent or concurrent conditions, compliance therewith must be had in order to effectually change the beneficiary.[25] In short, in dealing with these eases on change of beneficiary, distinction must be made not only as to whether the right is to change at will or not, but also between the reservation of the right and the exercise thereof.

Bearing in mind these distinctions, the following corollaries appear: (a) Unless the right is so reserved as to change *at will*, a policy, the beneficiary of which is one other than the insured bankrupt, by no possibility may become an asset upon bankruptcy. For, in such case, the beneficiary and not the insured is the owner.[26] And like other property a policy may, at the most, be an asset only to the extent of the ownership of the insured therein. (b) Independent of exercise, the mere reservation of a power to change the beneficiary prevents the interest of the beneficiary from vesting during the life-

he might elect, such a change might be effected by the last will and testament of insured. Hence the specific legatee of the policy was entitled to its proceeds to the exclusion of the beneficiary named in the policy itself.

[24]Cf. note 22, *supra.*

[25]Thus, in Lloyd v. Royal Union *Etc*: Co., 245 Fed. 162 (1917), the policy provided: "The insured may at any time * * * designate a new beneficiary * * * by filing written request therefor at the home office, together with this policy; such change to take effect on the indorsement thereof on the policy by the company." After divorce from plaintiff, the original beneficiary named in the policy, the insured requested a change of beneficiary which was permitted by the insurer without production of the policy because of his representation that the same was lost. Upon his death, the proceeds were paid to the new beneficiary. Later, at the suit of the plaintiff, recovery was allowed her on the original policy. Reed, D. J., said: "The defendant knew that plaintiff was named as beneficiary. in the policy, and should have known that upon its issuance and delivery she acquired an interest therein that could only be divested by a strict compliance with the terms it had so written. Instead of such compliance, it accepted from the insured his affidavit that the policy was lost (when in fact it had not been) and his agreement of indemnity therein, and issued in lieu thereof a duplicate, upon which it indorsed the name of his mother as beneficiary, in lieu of the plaintiff, in plain violation of the terms of the policy. If it shall suffer because of such attempted change, it will be because of its own disregard of the contract it had so written."

[26]See note 4 *et seq., supra;* also Central Bank v. Hume, 128 U. S. 195 (1888), where Mr. Chief Justice Fuller said: "It is indeed the general rule that a policy of insurance (ordinary life) and the money to become due under it belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named without his or their consent."

time of the beneficiary,[27] provided the right was *at will* as above defined. The beneficiary under such a policy acquires no right of any kind which he can assign or transfer to another until the death of the insured.[28] Until then, he has no interest to release.[29] The property in such a policy is in the insured and not in the beneficiary.[30] It is,

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[27]Hicks v. Northwestern Mutual *Etc.* Co., 166 Iowa 532 (1914). ("She [the beneficiary] was not a party to the insurance contract, nor would she become a party to it until her relation thereto should be fixed by the death of the insured without having appointed a new beneficiary * * *. The substance of the contract evidenced by a policy of this kind is that the insurer will pay the prescribed benefit to the person whom the insured shall have last designated to receive it. The appointment or designation made in the policy as issued is tentative only, and continues only until the insured shall have named some other person, or until his power so to do shall have been terminated by his death.") See also Denver Life Ins. Co. v. Crane, 19 Colo. App. 191 (1903), and Milne v. Northwestern Ins. Co., 23 Misc. (N. Y.) 553 (1898).

[28]Carpenter v. Knapp, 101 Iowa 729 (1897).

[29]Equitable Life Assur. Society v. Stough, 45 Ind. App. 411 (1909). *Held*, since beneficiary had no vested right because of the reserved power to change beneficiary at will, the insured and insurer had the same power to rescind the contract by mutual agreement as they had to make it.

In Roberts v. Northwestern National *Etc.* Co., 143 Ga. 780 (1915), the policy permitted a change of beneficiary by filing written notice thereof at the home office accompanied by the policy for suitable endorsement thereon. Instead, the insured surrendered the policy for cancellation which was then made. *Held*, the beneficiary may recover. The Court reached this remarkable conclusion as follows: "There was no attempt by the insurer and insured, in the instant case, to change or substitute a different beneficiary. The insured reserved that right in his policy, but did not act upon it. The insured and insurer attempted to surrender and cancel the policy, contending that, as the insured reserved the right to change the beneficiary, he had the right to agree with the insurer upon the cancellation and surrender of the policy. The right to change the beneficiary in an ordinary life insurance policy does not include the power to surrender and cancel without the consent of the beneficiary. The right to change the beneficiary is quite different from the right to surrender the policy for the purpose of cancellation; as the former contemplates modification and continued existence of the policy, while the latter contemplates its complete destruction. Holder v. Prudential Ins. Co., 77 S. *C.* 299."

It is submitted that even if the insured had not, in fact, exercised the right expressly reserved to him by the policy—because he failed to file a written notice at the home office (*cf.* note 25, *supra*)—still the mere reservation of the right inhibited the accession by the beneficiary of any right or interest in the policy, proprietary or contractual, until death of the insured at which time there was nothing in existence to which her right could attach. Cf. Note, 31 Harv. L. Rev. 658 (Feb., 1918).

[30]Hicks v. Northwestern Mutual *Etc.* Co., *supra*, note 27.

In Sea v. Conrad, 155 Ky. 51 (1913), a wife was beneficiary under a policy which reserved the right to change beneficiary. Later, a decree of divorce contained an order restoring to each party the property either had obtained from the other by reason of the marriage. She retained physical possession of the policy. He never made a change of beneficiary. *Held*, the judgment in that divorce divested her of all right to and interest in the proceeds. *Cf.* note 25, *supra.*

And this is true even if the premiums are paid by the beneficiary. Such payment merely affords her an equitable right to be reimbursed out of the proceeds of the policy the amount of the premiums so paid by her, with interest on each from the time it was paid. Schauberger v. Morel's Admr., 168 Ky. 368 (1916).

Such policies are the property of the husband, and his wife has no interest in them except as beneficiary, subject to his right to change. Therefore, after a decree of nullity, she had no right to keep it alive, in the absence of an insurable interest in the life of insured. Western & Southern *Etc.* Co., v. Webster, 189 S. W. (Ky.) 429 (1916).

therefore, an asset in his hands. Is it in the hands of his trustee upon bankruptcy, he not having yet exercised his right? Is the affirmative converse of the preceding corollary true?

Or, to revert to the old contention, has the insured, in such instance, in the language of the statute[31] preceding the proviso, a power "which he might have exercised for his benefit;" has he "property which prior to the filing of his petition he could by any means have transferred". Or are these statutory words idle and nugatory so far as insurance policies are concerned? Must the trustee to take such a policy as assets prove it within the description of the proviso? Some cases have so held.[32]

In *Cohen v. Samuels*,[33] the policy was payable to certain relatives of the insured bankrupt. It had a cash surrender value at the time of adjudication[34] which the insurer was willing to pay. It reserved to him the right at will to change the beneficiaries without the latter's consent. *Held*, the trustee was entitled to the cash surrender value as assets.

Thus once again, the Federal Supreme Court has clarified the atmosphere of conflicting decisions enveloping our subject, this time effectually quelling the notion that the trustee takes solely by virtue of the proviso. The Court, by Mr. Justice McKenna, said:

> "Regarding the section in its entirety there would seem to be no difficulty in its interpretation, but we are admonished * * * that there are considerations which give particular control to the proviso and distinguish between insurance policies and other property which the bankrupt can transfer or which can be levied upon and sold under judicial process against him (subdiv. 5). We have given attention to those considerations and feel their strength, but they are opposed by other considerations. It might indeed be that it would better fulfill the protection of insurance by considering the proviso alone and literally regarding the policy at the moment of adjudication, and if it be not payable then in words to the bankrupt—no matter what rights or powers are reserved by him, no matter what its pecuniary facilities and value is to him—to consider that he has no property in it. But we think such construction is untenable. The declaration of subdivision 3 is that 'powers which he might have exercised for his own benefit shall in turn be vested in the trustee,' and there is vested in him as well all property that the bankrupt could transfer or which by judicial process could be subjected to his debts,

[31]See note 9, *supra*.
[32]*Re* Samuels, 237 Fed. 796 (1917); *Cf. Re* Hammel, 221 Fed. 56 (1916); *Re* Arkin, 231 Fed. 947 (1916). *Contra; Re* Shoemaker, 225 Fed. 329 (1915); *Re* Bonvillain, 232 Fed. 370 (1916); Malone v. Cohn, 236 Fed. 882 (1916).
[33]38 Sup. Ct. Rep. 36 (1917).
[34]*Sic.* But see Everett v. Judson, *supra*, note 17.
[35]*Cf.* Note, 27 Yale Law Jour. 403 (Jan. 1918).

and especially as to insurance policies which have a cash surrender value payable to himself, his estate or personal representative. It is true the policies in question here are not so payable, but they can be or could have been so payable at his own will and by simple declaration. Under such conditions to hold that there was nothing of property to vest in the trustee would be to make an insurance policy a shelter for valuable assets, and it might be a refuge for fraud. And our conclusions would be the same if we regarded the proviso alone."

The *dictum* does not mar the decision,[35] for, in view of the contention raised and the *ratio decidendi* expressed, it merely means that even if the court had concluded to consider the proviso alone, the word "payable" therein was to be construed liberally and not literally, and hence the result would have been the same.

A life insurance policy, therefore, is an asset upon bankruptcy, to the extent of the cash avails which the insured *might* have obtained therefrom by his own unassisted act at the time of the petition in bankruptcy.

Of course, if the policy is exempt under state laws, it cannot become an asset[36], though the right to change the beneficiary is reserved to the insured.[37]

It follows that if an insured has procured his policy with the sole motive of providing protection to his dependents, a clause therein reserving to him the power to change the beneficiaries may have the legal effect of depriving them of that absolute protection he intended.

New York University,
April, 1918.

[36]See express exception in Bankruptcy Act quoted *ante* at footnote 9; also decision in Holden v. Stratton cited in footnote 19.
[37]*Re* Fetterman, 243 Fed. 975 (1917).